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THE MEANING OF “GROSS VIOLATION” OF HUMAN RIGHTS: A FOCUS ON INTERNATIONAL TRIBUNALS’ DECISIONS OVER THE DRC CONFLICTS

ROGER-CLAUDE LIWANGA*

I. INTRODUCTION

In December 2005, the International Court of Justice (“ICJ”) delivered a judgment on the case—between the Democratic Republic of the Congo (“DRC”) and Uganda—concerning Armed Activities on the Territory of the Congo, declaring that the killings, tortures, and destruction of properties of the DRC civilian population by Uganda and its army constituted “massive human rights violations.”¹ Two years earlier (in March 2003), the African Commission on Human and Peoples’ Rights (“African Commission”) had also issued a decision in response to a call to adjudicate on the same situation of armed conflicts in the DRC (*DRC v. Burundi, Rwanda and Uganda case*) where it described the actions of the respondent states as “flagrant violations” of human rights.² Yet in their respective rulings, the two judicial bodies failed to define what specifically constituted a “massive violation” or “flagrant violation” of human rights. Additionally, both the

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1. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 206-07 (Dec. 19).

2. Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 79-80 (May 15-29, 2003), <http://caselaw.ihrda.org/doc/227.99/view/en>. As background information on the cases relating to the armed conflicts in the DRC: In February 1999, the DRC lodged a complaint to the African Commission on Human and People’s Rights and claimed, among other things, that it was the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda; and that the armed forces of those three countries also perpetrated gross violations of the human rights against its population since August 1998. See CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 245 (3rd ed., 2014). Concurrently, in June of 1999, the DRC also lodged another complaint before the ICJ against the same countries concerning the same events and the same issues (act of armed aggression on its territory and violation of the human rights of its civilian population). See TOMUSCHAT, *supra* note 2. The African Commission and the ICJ have respectively issued their decisions in 2003 and 2005 in regards with the DRC cases. Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6 (Feb. 3); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Burundi), Application: Instituting Proceedings, 1999 I.C.J. Rep. 117 (June 23).

ICJ and African Commission did not clearly establish the criteria that led them to conclude the killings and tortures against the DRC population were effectively "massive/flagrant violations" rather than "regular violations" of human rights. This silence has raised some questions as to: What makes some acts of killing to be perceived as "massive" or "flagrant" violations of human rights while other acts of killing are just "regular violations" of individuals' right to life? What are the parallels between the terms "flagrant," "massive," "gross," "systematic," and "serious" violations of human rights?

The paper explores the meaning of "gross violation" of human rights and examines the criteria making a given violation to be ascertained as a "gross violation" of human rights. This paper posits that the terms "gross," "flagrant," "massive," "systematic," or "serious" violations of human rights are often interchangeably or cumulatively used by both international legal instruments and quasi-judicial bodies in order to refer to a violation of the same gravity.³ The paper also suggests that, even though there is no unanimous definition of the concept "gross violations" of human rights, the scope of coverage of this concept concerns the violations of two categories of rights, namely civil and political rights and socio-economic rights. The paper concludes that several elements need to be taken into account while assessing the seriousness of a violation, including: the type of the violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to take appropriate measures relating to the violation in question.⁴

This paper is divided into two main parts. Section I will examine the different definitions of "gross violation" of human rights as suggested by international legal documents and scholars. Section II will analyze the criteria of classification of "gross violation" of human rights in light of recent international and regional jurisprudence.

II. DEFINING THE CONCEPT OF "GROSS VIOLATION" OF HUMAN RIGHTS

The term "gross violation" of human rights draws its origin from different international and regional legal instruments within different legal systems. International and regional legal instruments and judicial bodies are inconsistent in their language when referring to the term "gross violation" of human rights.⁵

3. Takhmina Karimova, *What Amounts To 'A Serious Violation of International Human Rights Law': An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty*, in ACADEMY BRIEFING NO. 6, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS 12 (Geneva Academy, 2014), http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf. See generally, Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, at 283-85 (2001).

4. CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* 11 (1988). See also M. E. Tardu, *United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 SANTA CLARA L. REV. 559, 582-84 (1980).

5. Karimova, *supra* note 3, at 12.

These international legal instruments and judicial bodies have been using interchangeably and cumulatively the terms "gross," "grave," "flagrant," "massive," "systematic," and "serious." For instance, the 1967 U.N. Resolution 1235 of the Economic and Social Council ("ECOSOC") compelled the U.N. Commission "to examine information relevant to gross violations of human rights... as exemplified by the policy of apartheid."⁶ The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment cumulatively speaks of "gross, flagrant or mass" violations of human rights in connection with torture,⁷ the 1993 Vienna Declaration and Program of Action refers to "gross and systematic violations" of human rights,⁸ and the 2005 U.N. Basic Principles and Guidelines uses the term "gross" and "serious violations" to qualify the gravity of the violations.⁹ Likewise, international and regional judicial bodies have also employed different terminologies when talking about certain acts violating international laws: the ICJ talks of "massive human rights violations" in the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*).¹⁰ The African Commission and the African Court on Human and Peoples' Rights ("ACtHPR") utilize interchangeably the terms "gross," "grave," "flagrant," "serious," or "massive,"¹¹ and the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights ("IACtHR") refer to "serious violation" to depict the gravity of some acts.¹²

6. Economic and Social Council Res. 1235 (XLII) U.N. Doc E/4393 (June 6, 1967).

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, ¶ 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

8. World Conference on Human Rights, *Vienna Declaration and Program of Action*, ¶ 30, U.N. Doc. A/CONF.157/23 (Jun. 25, 1993).

9. G.A. Res. 60/147, preamble, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

10. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 207 (Dec. 19).

11. See Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 79-80. See also Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Decision 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], fn. 120 (Nov. 11-25, 2009) (using terms "grave" and "gross" violations of human rights to refer to the forced evictions); Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, Decision 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 100-102 (May 13-27, 2009) (employing the term "serious and massive violations" to characterize the situation where about ten thousand people were forcibly evicted from their properties).

12. The European Court of Human Rights has respectively upheld that the attitudes of Bulgaria and Romania amounted "serious violations" under the European Convention of Human Rights. *Moldovan and Others v. Romania* (No. 2), 2001-XII Eur. Ct. H.R. 167, 192; *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 31. The IACtHR employed the term "grave" human rights violations to refer to the extrajudicial executions and forced disappearances occurred respectively in Colombia and Guatemala. *Tiu Tojin v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 53 (Nov. 26, 2008); *Pueblo Bello Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 143 (Jan. 31, 2006). The IACtHR used "serious violations" to qualify acts of torture. *Vera-Vera et al. v. Ecuador*, Prelim. Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 226, ¶ 117 (May 19, 2011).

It should be noted that, while using interchangeably and cumulatively the concepts of “gross,” “massive” or “serious,” both the international instruments and judicial bodies have always failed to distinguish between the content of each concept.¹³ This may lead one to conclude that, under international law, the epithets “gross,” “grave” “flagrant” or “serious” have the same meaning in terms of qualifying the gravity of certain human rights violations. However, for the purpose of this paper, the term “gross violation of human rights” will be preferably used for the sake of uniformity of terminology. But, beyond the issue relating to the use of terminology, the most important problem is to understand the meaning of the concept itself. What does “gross violation” of human rights mean?

There is no universally accepted definition of the term “gross violation” of human rights, nor is there a formally determined content of the concept itself.¹⁴ The existing definitions of “gross violation” of human rights are provided by quasi-legal instruments that lack a binding effect (such as the declarations and guidelines of the U.N. or EU’s commissions and agencies), rather than treaties with binding effects. For instance, Paragraph 30 of the 1993 U.N. Vienna Declaration and Program of Action provides an enumeration of acts that should constitute “gross violation” of human rights by stating that:

Gross and systematic violations. . .include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.¹⁵

Likewise, the Council of Europe’s Guidelines on Eradicating Impunity for Serious Human Rights Violations catalogued acts comprising “gross violation” of human rights.¹⁶ Scholars such as Stanislav Chernichenko and Theo Van Boven have also proposed some definitions of “gross violation” of human rights. In his Working Paper submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chernichenko noted that

gross and large-scale human rights violations . . . [should include] murder,

13. Karimova, *supra* note 3, at 12.

14. *Id.*

15. World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 30, U.N. Doc. A/CONF.157/23 (June 25, 1993).

16. *Guidelines on Eradicating Impunity for Serious Human Rights Violations*, at 23, COM (2011) 13 add (Mar. 30, 2011), stipulates:

For the purposes of these guidelines, “serious human rights violations” concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court’s case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private and family life (Article 8 of the Convention).

including arbitrary execution; torture; genocide; apartheid; discrimination on racial, national, ethnic, linguistic, or religious grounds; establishing or maintaining over persons the status of slavery servitude, or forced labour; enforced or involuntary disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population."¹⁷

Chernichenko's definition of "gross violation" of human rights is relatively similar to the one suggested by Van Boven.¹⁸

Two observations can be made from all of the above definitions. First, there is no exhaustive list of violations that may constitute "gross violation" of human rights; meaning that the term "gross violation" of human rights includes panoply of violations. Second, the scope of coverage of "gross violations" of human rights concerns the violations of both categories of rights: (1) civil and political rights, and (2) social, economic, and cultural rights. But, there is a limitation within these definitions to the extent that they seem to merely offer an enumeration of violations that may constitute "gross violations" rather than supply the criteria to assess the seriousness of the violations committed.¹⁹ In other words, those definitions are descriptive rather than prescriptive of criteria necessary to evaluate the gravity of the enumerated violation(s).²⁰ In this regard, the U.N. Human Rights Due Policy on U.N. Support to Non-U.N. Security Forces has recently provided a "complex" definition of "gross violation" of human rights, which unifies different legal regimes, such as international law, international humanitarian law, and international criminal law.²¹ But that definition is unclear as to what the terms

17. Definition of Gross and Large-scale Violations of Human Rights as an International Crime, Comm. on Human Rights, Prevention of Discrimination and Protection of Minorities, Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Comm. decision 1992/109, 14, U.N. Doc. E/CN.4/Sub.2/1993/10 (June 8, 1993).

18. According to Theo Van Boven, gross violations of human rights and fundamental freedoms include at least the following: genocide, slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular on race or gender. *See*, Theo Van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by M. Theo van Boven, Special Rapporteur, 7-8, U.N. Doc No. E/CN.4/Sub.2/1993/8, (July 2, 1993). *See also*, MAX DU PLEIS & STEPHEN PETE, REPAIRING THE PAST?: INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES 18 (2007).

19. Karimova, *supra* note 3, at 19.

20. *Id.* at 34.

21. *Id.* at 14. *See also* U.N. Secretary-General, Letter dated February 25, 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, A/67/775 (Mar. 5, 2013) [hereinafter the Human Rights Due Policy]. Paragraph 12 of the Human Rights Due Policy stipulates:

"Grave violations" mean, for the purposes of the present policy:

(a) In the case of a unit:

(i) Commission of 'war crimes' or of 'crimes against humanity', as defined in the Rome Statute of the International Criminal Court, or 'gross violations' of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement

“significant degree of frequency” or “significant scale” would actually mean in practice.²² In light of the difficulty of defining the concept “gross violation” of human rights, a more comprehensive definition should not only enumerate the wrongful acts comprising “gross violations” of human rights, but also reflects some standard so as to evaluate how a given wrongful act can be qualified as a “gross violation.” Accordingly, a more holistic definition can be formulated as follows:

“Gross violation” of human rights comprises at least one the following acts, when committed repetitively or non-repetitively against any individual as part of a planned action by State actor(s) or non-state actor(s), or committed without effective judicial measure(s) of the State government to investigate and prosecute the perpetrator(s):

- Torture and cruel, inhuman, and degrading treatment or punishment;
- Summary or arbitrary execution;
- Forced or involuntary disappearance, or arbitrary and prolonged detention;
- Apartheid, discrimination based on gender, race, nationality, ethnicity, language, culture, or religion;
- Human trafficking, slavery, or slavery-like practice;
- Foreign occupation or alien domination;
- Terrorism;
- Lack of the rule of law;
- Denial of access to education, food, or other socio-economic rights;
- Denial of access to free expression, public affairs, and services of the country; and

under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena); or

(ii) A pattern of repeated violations of international humanitarian, human rights or refugee law committed by a significant number of members of the unit; or

(iii) The presence in a senior command position of the unit of one or more officers about whom there are substantial grounds to suspect:

• Direct responsibility for the commission of ‘war crimes’, ‘gross violations’ of human rights or acts of refoulement; or

• Command responsibility, as defined in the Rome Statute of the International Criminal Court, for the commission of such crimes, violations or acts by those under their command; or

• Failure to take effective measures to prevent, repress, investigate or prosecute other violations of international humanitarian, human rights or refugee law committed on a significant scale by those under their command;

(b) In the case of civilian or military authorities that are directly responsible for the management, administration or command of non-United Nations security forces:

(i) Commission of grave violations by one or more units under their command;

(ii) Combined with a failure to take effective measures to investigate and prosecute the violators.

22. Karimova, *supra* note 3, at 14; Human Rights Due Policy, *supra* note 21, ¶ 12 (a)(i), (a)(iii).

- Destruction of properties or looting of a community's natural resources.²³

So what are the components that a wrongful act should have in order to rise to the level of "gross violation" of human rights?

III. CRITERIA OF CLASSIFICATION OF GROSS HUMAN RIGHTS VIOLATIONS

Before answering the above question, it should be noted that as there is no unanimous definition of "gross violation" of human rights under international law, and there is no universally accepted method to assess whether or not a given act should be evaluated as a "gross violation" of human rights. According to the International Law Commission ("ILC")'s Commentary on Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, there are two criteria in assessing whether the gravity of a given violation amounts to a "gross violation" of human rights: the first concerns "the character of the obligation breached," which derives from a peremptory norm of general international law; the second involves "the intensity of the breach."²⁴ In reality, the ILC's two-criteria tests can be regrouped into one criterion test: "the qualitative criterion," which is subdivided into two segments: the nature of rights violated (peremptory rights), and the character of the violation (cruelty of the breach). However, this paper agrees with M. E. Tardu and Cecilia Medina Quiroga that four elements should be present in order for a violation to be identified as a "gross violation" of human rights,²⁵ including: (1) the qualitative element, (2) the

23. This definition is suggested as a summary of all the above definitions, and it intends to fill the gaps in terms of the criteria of evaluation of gross human rights violations.

24. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 282 (2001). Article 40 of the ILC's report to the General Assembly, which adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts, provides:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.

Id. at art. 40.

Commenting on the above provision, the ILC noted that:

Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfill both criteria. The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is one which is . . . "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Id. at 282 (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT]).

25. QUIROGA, *supra* note 4, at 11. See Tardu, *supra* note 4, at 583-84.

quantitative element, (3) the time element and (4) the planning element.²⁶ These are the criteria that are also reflected in the definition suggested above.

A. Qualitative Element

The qualitative criterion of "gross violation" of human rights has two segments, namely (1) the type of the rights violated, and (2) the character of the violation itself.²⁷ First, concerning the type of the rights violated: to be considered as "gross violation," a given violation should be assessed as to if or if not it breaches a derogable right or non-derogable right.²⁸ The general understanding is that a wrongful act can amount to a "gross violation of human rights" only if it violates a non-derogable right.²⁹ Of course, this test raises another debate on the hierarchy of human rights, which will not be discussed in this paper. Yet, even if human rights are indivisible and interdependent, some rights are part of *jus cogens* and can therefore be subjected to no derogation in terms of their protection.³⁰ In light of the provisions of the International Covenant on Civil and Political Rights (Article 4(2))³¹, the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15(2))³² and the American Convention on Human Rights (Article 27(2))³³, the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws are non-derogable. This means that those rights have to be protected in any circumstances during times of peace and war. But under international and regional jurisprudence, there are instances where tribunals have also upheld that some

26. QUIROGA, *supra* note 4, at 11.

27. QUIROGA, *supra* note 4, at 13; Karimova, *supra* note 3, at 16; Tardu, *supra* note 4, at 583-84.

28. Unlike the derogable rights, the non-derogable rights are the rights that cannot be theoretically taken away or compromised. In light of most international and regional treaties, the non-derogable rights include:

the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws. These rights are also known as peremptory norms of international law or *jus cogens* norms.

See U.N. TERMS,

<http://unterm.un.org/dgaacs/untterm.nsf/8fa942046ff7601c85256983007ca4d8/d4d4bb9694e5b40da8525751b0077e882?OpenDocument> (last visited June 24, 2015).

29. QUIROGA, *supra* note 4, at 13; Karimova, *supra* note 3, at 16.

30. Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EJIL 917, 918-20 (2001). See RULE OF LAW IN ARMED CONFLICTS PROJECT, *Derogation From Human Rights Treaties in Situations of Emergency*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php (last visited Oct. 13, 2015).

31. International Covenant on Civil and Political Rights art. 4, ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171.

32. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221.

33. American Convention on Human Rights art. 27, ¶ 2, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123.

violations of derogable rights (such as the right to education, right to housing, right to properties, or right to healthcare service) may amount to "gross violations" of human rights. For instance, in the case on Armed Activities in the Territory of the Congo (*DRC v. Uganda*), the ICJ ruled that acts of torture and other forms of inhuman treatment (non-derogable rights), as well as the destruction of civilian houses (derogable right), constituted massive violations of human rights of the Congolese population.³⁴ Similarly in *World Organization against Torture v. Zaire*, the African Commission also concluded that the violation of the right to education (due to the closure of universities and secondary schools during two years) amounted to "gross violations" of human rights.³⁵

Second, in regards to the character of the violation, it is required that a given violation must have a certain degree of seriousness or cruelty in order to be described as a "gross violation" of human rights.³⁶ Dinah Shelton noted that acts of "gross violations" of human rights are "those that are particularly serious in nature because of their cruelty or depravity."³⁷ In *DRC v. Burundi, Rwanda and Uganda*, the African Commission also assessed the cruel nature of the violation by considering that:

The indiscriminate dumping of and mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the Complainant State. . . The [African] Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African historical tradition and values enunciated in the preamble to the African Charter.

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The African Commission made a similar assessment in its preceding ruling in *World Organization against Torture v. Zaire*,³⁹ where it had evaluated the seriousness of the violation based on "[t]he failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine" to the victims.⁴⁰

34. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. at ¶ 206-07.

35. *World Organization against Torture v. Zaire*, Decision on Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 48 (Mar. 26-Apr. 4, 1996).

36. QUIROGA, *supra* note 4, at 15; Karimova, *supra* note 3, at 17.

37. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 390 (2006).

38. Democratic Republic of Congo v. Burundi, Rwanda and Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 87.

39. *World Organization against Torture v. Zaire*, Decision on Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 47 (March 26-Apr. 4, 1996).

40. *Id.*

B. *Quantitative Element*

The qualitative element is not the only factor for a violation to amount to "gross violation" of human rights; there is also the quantitative component that relates to the quantity of violations (or rights or victims).⁴¹ The analysis of the quantitative element leads to questions as to: How many wrongful acts are required for violation(s) to be described as "gross violations"? Or, how many victims or violated rights are required for violations to amount to "gross violations" of human rights? And, can a single violation of a single right against an individual amount to a "gross violation" of human rights? There is no international or regional legal document that provides clear answers to these questions. But scholars agree that the use of epithets such as "gross," "grave," "flagrant," "serious," "massive," "systematic," or "large-scale" by international legal documents and judicial bodies may insinuate that there should be more than one violation (or individual) for a given violation to equal a "gross violation" of human rights.⁴² For instance, in its ruling on the occurrence of "massive human rights violations" in the case concerning *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the ICJ also took into account the large number of victims and various rights violated. The Court held that:

[T]he armed conflict between Ugandan and Rwandan forces in Kisangani led to

"fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . .

Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests."⁴³

In *Sudan Human Rights Organization and Centre on Housing Rights and Evictions v. Sudan*, the African Commission also observed that "[s]uch is the case with the situation in the Darfur region, where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available."⁴⁴ The African Commission considered that the alleged violations *prima facie* constituted "serious and massive violations . . ."⁴⁵

From the above, it appears that the magnitude of the violations in terms of the

41. QUIROGA, *supra* note 4, at 12.

42. *Id.*

43. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. ¶ 208.

44. *Sudan Human Rights Organization and Centre on Housing Rights and Evictions / Sudan*, Decision 279/03 – 297/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 101.

45. *Id.* ¶ 102.

large number of victims and rights violated is an important factor in determining whether or not the given violations amount to "gross violations" of human rights. Yet the existence of more than one victim and violated right may not be the only factor to examine when assessing the gravity of violations. This viewpoint seems to be shared by the European Commission on Human Rights (European Commission). Indeed, in *Ireland v. United Kingdom*, the European Commission upheld that: "Although one single act contrary to the Convention is sufficient to establish a violation, it is evidence that the violation can be regarded as being *more* serious if it is not simply one outstanding event but forms part of a number of similar events which might even form a pattern."⁴⁶ In light of the European Commission's ruling, a single violation may also be enough to constitute a "gross violation" of human rights,⁴⁷ and the existence of numerous violations is not a condition *sine qua non* for establishing "gross violations" of human rights.⁴⁸

Cecilia Medina Quiroga has also noted that the quantitative element of "gross violations" of human rights can have a link with the status of victim(s). She writes: "it is possible that a smaller number of victims is required to arrive at a situation of gross, systematic violations of human rights, when the violation of human rights is committed against certain individuals important to the national community or to a specific section of the population."⁴⁹

A situation where the existence of one violation or victim is enough to amount to a "gross violation" of human rights can also be illustrated through the following hypothetical example: Assume that a Mr. X is a community leader in the region Z where he often campaigns against the enlistment of the youths of his community into jihadist groups and that the members of a jihadist group Y have publically decapitated Mr. X because of his opposition to their movement. In this hypothesis, there is "gross violation" of human rights even if one is in the presence of a single violation (decapitation of an individual impeding the right to life) committed against one victim (who is a community leader). In this example, there would still be "gross violation" of human rights even if Mr. X were regular citizen rather than a community leader. This is because of not only the nature of the right violated but also the brutality of the act itself which reflects a higher degree of cruelty aiming to terrorize the entire community rather than ending the life of an opponent. In the same context, the U.N. and Lebanon established in 2006 the Special Tribunal for Lebanon to specially adjudicate the act of terrorism (which is one of the acts constituting "gross violations" of human rights) committed against the former Lebanese Prime Minister Rafiq Hariri in particular, and twenty-one other people in a single event.⁵⁰

46. Karimova, *supra* note 3, at 17 (quoting *Ireland v. UK*, 1977 Y.B. Eur. Conv. on H. R. 762 (Eur. Comm'n on H.R.)(emphasis added)).

47. *Id.* at 18.

48. *Id.* at 18.

49. QUIROGA, *supra* note 4, at 15.

50. See S.C. Res. 1757, annex, Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon (May 30, 2007).

C. *Element of Time*

The element of time is another essential component to evaluate the seriousness of a violation. According to the U.N. Economic and Social Council ("ECOSOC") Resolution 1503(XLVIII), a given violation should have a "consistent pattern."⁵¹ This idea of pattern seems also to run through the provisions of the Rome Statute of the International Criminal Court⁵² and the United States Foreign Relations regulations.⁵³ The term "consistent pattern" implies a certain repetition of the violation's occurrence over a period of time.⁵⁴ In the case concerning *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the ICJ also examined the repeated occurrence of violations against the DRC's population by observing that: "The armed conflict between Ugandan and Rwandan forces in [the DRC's province of] Kisangani led to 'fighting spreading into residential areas and indiscriminate shelling occurring for 6 days'"⁵⁵ The Uganda People's Defense Forces ("UPDF") also carried out widespread bombing and destruction of hundreds of villages from 2000 to 2002.⁵⁶

In its judgment in *Ireland v. United Kingdom*, the ECtHR considered the repetitive nature of the violations by upholding that: "A practice incompatible with

51. Economic and Social Council Res. 1503(XLVIII), ¶¶ 1, 5 (May 27, 1970) (requesting that the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider communications and replies of governments that "appear to reveal a consistent pattern of gross and reliably attested violations of human rights. . .")

52. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

"[C]rimes against humanity" means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender. . . ;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Id. at art. 7.

53. See 22 U.S.C. § 2304(a)(2) (2012) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.").

54. Tardu, *supra* note 4, at 583; QUIROGA, *supra* note 4, at 12, Karimova, *supra* note 3, at 15.

55. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. ¶ 208. See also *id.* ¶ 204-207.

56. *Id.* ¶ 206.

the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches.”⁵⁷

In view of the above rulings, one may wonder if a one-time, unrepeated violation could also be qualified as a “gross violation” of human rights. This is a pertinent question. Despite the fact that many cases of “gross violations” of human rights happened to be repetitively committed during a certain period of time, some scholars have commented that the international quasi-judicial bodies have never concluded that there should be a systematic occurrence of a violation in order for it to be perceived as a “gross violation” of human rights.⁵⁸ In *Prosecutor v. Salim Jamil Ayyash and others*, the Trial Chamber of Special Tribunal for Lebanon issued a warrant of arrest against the accused persons for perpetrating a terrorist act committed as a single violation on a single day (14 February 2005) against the former Lebanese Prime Minister Rafiq Hariri and others.⁵⁹ Likewise, the hypothetical example posited above also demonstrates how an unrepeated violation can also meet the definition of “gross violation” of human rights.

In light of this, the assessment of the gravity of violations should therefore depend on the particularity of each case no matter whether or not the wrongful act was committed repetitively.⁶⁰

D. Element of Planning

The term “consistent pattern,” which was used through the ECOSOC Resolution 1503 to establish a violation as a “gross violation” of human rights, can also imply the existence of an element of planning.⁶¹ Accordingly, E.M. Tardu notes that acts of “gross violations” of human rights have “an element of planning or of sustained will on the part of the perpetrators.”⁶² For Cecilia Medina Quiroga, the term “gross violation” or “systematic violation” also suggests an element of planning.⁶³ In the *Blaskic case*, the International Tribunal for Former Yugoslavia (ITFY) ruled that the term “systematic” refers to “the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community.”⁶⁴ In the case concerning Armed Activities on the Territory of the Congo (*DRC v.*

57. *Ireland v. United Kingdom*, 1977 Y.B. Eur. Conv. on H. R. ¶ 159.

58. QUIROGA, *supra* note 4, at 12. See also Karimova, *supra* note 3, at 6.

59. E.g., *Prosecutor v. Ayyash*, STL-11-01/T/TC, Warrant For The Arrest Of Hussein Hassan Oneissi, (April 17, 2014).

60. QUIROGA, *supra* note 4, at 12.

61. *Id.* at 15. See also Rome Statute, *supra* note 51 at art. 8, ¶. 1 (“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”).

62. Tardu, *supra* note 4, at 583.

63. QUIROGA, *supra* note 4, at 15.

64. *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, ¶ 203 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

Uganda), the ICJ observed that Uganda began providing military supports to the DRC's rebel groups in January 1999 and March 1999,⁶⁵ and that "the UPDF [Uganda People's Defense Forces] incited ethnic conflicts and took no action to prevent such conflicts in Ituri district . . . [t]he confrontations . . . resulted in some 10,000 deaths and the displacement of some 50,000 people . . ."⁶⁶

In other words, Uganda's incitement of ethnic violence and supplying of the DRC's armed groups with weapons, coupled with its inaction to stop ethnic conflicts, may denote the existence of a plan intended to destroy and destabilize the DRC's community.

E. Failure of Undertaking Judiciary and other Actions

Besides the presence of elements of quality, quantity, time, and planning, the seriousness of a violation can also be assessed in considering the failure of the government to implement judiciary actions to prosecute the perpetrators of the violation and/or to take other measures to prevent the continual occurrence of atrocities. As discussed above in the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), Uganda's behaviour was also ascertained as a "gross violation" of human rights due to its failure to take appropriate actions to prevent the killings and massacres of the DRC's population.⁶⁷ Prior to that ICJ decision, the ECtHR had adopted a similar position. In *Velikova v. Bulgaria*, the ECtHR considered that Bulgaria's:

[U]nexplained failure to undertake indispensable and obvious investigative steps is to be treated with particular vigilance. In such a case, failing a plausible explanation by the Government as to the reasons why indispensable acts of investigation have not been performed, the State's responsibility is engaged for a particularly serious violation of its obligation under Article 2 of the Convention [to protect the right to life].⁶⁸

With regards to the above ruling, it also seems that it is not necessary that a violation be committed by the state's organs in order for it to amount to a "gross violation" of human rights. This means that acts of "gross violations" which are committed even by non-state actors (such as ISIS or Boko Haram) can be attributed to the government if it negligently failed to prosecute and prevent the occurrence of these wrongful acts.

In conclusion, the terms "gross," "grave," "flagrant," "serious," or "massive" are used interchangeably and even cumulatively by international legal documents and quasi-judicial bodies. There is no unanimously accepted definition of "gross violations" of human rights, which consist of the violations of civil rights, political

65. Armed Activities on the Territory of the Congo (Dem. Rep. Congo), Judgment, 2005 I.C.J. Rep. 168 ¶ 41.

66. *Id.* ¶ 209.

67. *See id.* ¶ 211.

68. *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. at 20. *See also* *Eremiasova v. Czech Republic*, 2012 Eur. Ct. H.R. ¶ 132.

rights, and socio-economic rights. And, the seriousness of violations is assessed on the basis of several factors, including: the type of violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to appropriate measures to prevent and punish the violation. In view of this, the cases on armed conflicts in the DRC can be perceived as meeting all the suggested criteria of “gross violations” of human rights.



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